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28 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA

29 ERICA FRASCO, individually and on behalf
30 of all others similarly situated,

31 Plaintiffs,

32 v.

33 FLO HEALTH, INC., GOOGLE, LLC,
34 META PLATFORMS, INC., and FLURRY,
35 INC.,

36 Defendants.

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55 Case No.: 3:21-cv-00757-JD

56
57 **PLAINTIFFS' MOTION FOR A**
PRELIMINARY DETERMINATION
REGARDING THE AUTHENTICITY AND
ADMISSIBILITY OF CERTAIN
DOCUMENTS PRODUCED BY FLO
HEALTH, INC.

58 Date: August 21, 2025

59 Time: 10:00 AM

60 Location: Courtroom 11, 19th Floor
61 450 Golden Gate Avenue
62 San Francisco, California

63 Judge: Hon. James Donato

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that, pursuant to Civil Local Rule 7, Plaintiffs move this Court for an order preliminarily authenticating and admitting certain documents that Flo Health, Inc. (“Flo”) produced in this litigation (the “Motion”).

STATEMENT OF ISSUES TO BE DECIDED

- (1) Whether the 16 documents listed in Exhibit A¹ are authentic under Rule 901 of the Federal Rules of Evidence (“FRE”); and

(2) Whether the 16 documents listed in Exhibit A are admissible under FRE 402, with consideration of FRE 802, 801(c), and 801(d)(2).

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

As detailed in Plaintiffs' Motion for Orders Concerning Flo's Trial Witnesses, Flo is playing obstructionist games concerning witnesses. *See* ECF No. 704 ("Witness Motion"). Flo's gamesmanship is also impacting the Parties' ability to reach agreement on the authenticity and admissibility of trial exhibits. With limited exception, Flo has declined to stipulate to the authenticity of documents *it produced* in discovery. In a meet-and-confer on July 9, 2025, Flo connected this to their strategy of holding back witnesses, by claiming that Meta is likely more willing to stipulate to authenticity because—in Flo's view—unlike Flo's witnesses, Meta's witnesses can be compelled to attend trial.

While Plaintiffs and Meta have made great strides in negotiations regarding the authentication and admissibility of documents, Flo has resisted this process. On July 9, 2025, after sending a substantially narrowed list of documents for consideration, Flo finally met with Plaintiffs on this topic. Flo declined to stipulate to the admissibility of any document and contested the authenticity of all but a small number of technical documents and one screenshot file.²

¹ Documents cited as “Ex. ____” refer to Exhibits to the July 11, 2025 Declaration of Jake Bissell-Linsk (“Bissell-Linsk Decl.”), filed contemporaneously with this Motion.

² The only other documents Flo has agreed are admissible are those listed in its Defendants' exhibit lists, which are included in Exhibit A of the Parties jointly filed list. See ECF No. 686-1.

1 While the Court was certainly hoping the Parties could stipulate to agreements on exhibits,
 2 in the absence of a willingness to agree by Flo, Plaintiffs believe this Motion is consistent with the
 3 Court's comments during the June 26, 2025 Pretrial Hearing:

4 Let me suggest that you do a preadmitting [of] everything you
 5 possibly can. Okay? So it's a lot easier for me and for you and
 6 makes your trial time go a lot faster. Because it eats up your clock
 7 if you're going to fight about it. Sounds like you won't, which is
 great. But just say, "We've already agreed this can be admitted."

Ex. C (Pretrial Hearing Tr.) at 29:4-9.

8 While an order granting Plaintiffs' Witness Motion would address the most problematic
 9 aspects of Flo's obstructionist strategy, a preliminary ruling that certain uncontroversially
 10 authentic and facially relevant documents are admissible would greatly assist in assuring that the
 11 jury's time is well spent at trial.³ *See* FRE 104(a) (courts determine preliminary questions
 12 regarding admissibility). This Motion seeks a preliminary determination that 16 specific
 13 documents produced by Flo in discovery are authentic and admissible at trial. For the reasons set
 14 forth below, these preliminary evidentiary determinations are entirely appropriate here.

II. ARGUMENT

16 Plaintiffs seek a preliminary determination by the Court that the 16 documents (the
 17 "Documents") listed and reproduced in Exhibit A are authentic and admissible. Exhibit A contains
 18 a chart stating the indicia of authenticity and basis of relevance for each Document and a statement
 19 of why the Document should not be excluded as hearsay.⁴ While a ruling on this Motion would
 20 save significant time at trial, Plaintiffs are cognizant that it imposes some burden on the Court and
 21 have sought to keep the list for this Motion to a minimum. This list is not meant to be exhaustive
 22 of all of the documents produced by Flo that Plaintiffs may use at trial, and for example, does not
 23 include documents that are still being translated by a neutral translator agreed to by the Parties.

25 ³ If the instant Motion is granted, Plaintiffs will only seek to call two Flo witnesses: Roman Bugaev
 26 and Max Scrobov. Witness Motion at 3 n.3. However, granting the instant Motion is not a full
 27 substitute for Plaintiffs' need to question Flo witnesses at trial. *See id.* at 3-4.

28 ⁴ Exhibit B to the Bissell-Linsk Declaration is provided purely for reference, it contains copies of
 29 documents *cited* within the table of Exhibit A as relevant to establishing authenticity.

1 **Authenticity.** Each of the documents bears the hallmarks of authenticity. FRE 901
 2 “requires only that the court admit evidence if sufficient proof has been introduced so that a
 3 reasonable juror could find in favor of authenticity or identification.” *United States v. Tank*, 200
 4 F.3d 627, 630 (9th Cir. 2000) (citations omitted). Flo’s position—and desperate strategy—appears
 5 to be that documents can only be authenticated by a witness, and that by withholding Plaintiffs
 6 access to any witness at trial, they will prevent the jury from hearing the evidence. That is
 7 inconsistent with both the spirit and letter of the law. The Ninth Circuit has held that there is no
 8 requirement that “all documents be authenticated through personal knowledge” and that, “for
 9 instance,” documents “attached to an exhibit list in a summary judgment motion could be
 10 authenticated by review of their contents if they appear to be sufficiently genuine.” *Orr v. Bank*
 11 *of Am., NT & SA*, 285 F.3d 764, 778 n.24 (9th Cir. 2002).

12 As most relevant here, documents produced by an opposing party in discovery are routinely
 13 deemed authentic on that basis alone, barring any specific reason to doubt their authenticity. *See*
 14 *id.* at 777-78 (recognizing documents could have been authenticated by “having been produced in
 15 discovery,” but noting that because they were not produced in discovery, further inquiry was
 16 required). Respected treatises recognize this uncontroversial principle. *See* 31 *Wright & Miller’s*
 17 *Federal Practice & Procedure* § 7105 (2d ed. 2025) (“Authentication also can be accomplished
 18 through judicial admissions such as . . . production of items in response to . . . [a] discovery
 19 request.”). Many cases also confirm this principle. For example:

20 [T]he documents . . . were produced by StreamCast in discovery. This
 21 constitutes sufficient circumstantial evidence for a reasonable jury to find
 22 the documents authentic. . . . StreamCast has not contended that the
 23 documents are not what Plaintiffs purport them to be. That would be a hard
 24 argument to make, of course, because StreamCast produced them.

25 *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 972 (C.D. Cal. 2006)
 26 (authentication requirement was satisfied where “the documents at issue, many of which were
 27 printed on the plaintiff’s letterhead, were produced in discovery”); *see also, e.g., Maljack Prods., Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 889 n. 12 (9th Cir. 1996) (similar); *Anand v.*

BP W. Coast Prods. LLC, 484 F.Supp.2d 1086, 1092 n.11 (C.D. Cal. 2007) (“Documents produced in response to discovery requests are admissible on a motion for summary judgment since they are self-authenticating and constitute the admissions of a party opponent.”); *In re Homestore.com, Inc. Sec. Litig.*, 347 F.Supp.2d 769, 781 (C.D. Cal. 2004) (similar). This principle reflects sound legal reasoning: parties producing documents in discovery implicitly represent their authenticity.

Each document listed in Exhibit A was produced by Flo in discovery in this case, as demonstrated by the fact that each bears a bates number with the prefix “FLO-”, which was the bates prefix Flo used in this litigation. That the Documents were produced by Flo is a sufficient basis to determine that they are authentic, and there is no reason whatsoever to doubt their authenticity. Critically, Flo has not suggested these Documents are forgeries, altered, or otherwise inauthentic. Its unwillingness to compromise appears to be purely tactical—an attempt to consume trial time with unnecessary foundational testimony, while limiting witness availability.

Beyond being produced by Defendants, these Documents bear other indicia of authenticity, such as being attached to emails to or from senior Flo officers, marked by Flo as confidential (indicating they contained genuine business information), or attested to as authentic by Flo’s counsel in prior filings. These factors are sufficient to establish authenticity. FRE 901(b)(4) (Authenticity may be established from “appearance, contents, substance, internal patterns, or other distinctive characteristics . . . taken together with all the circumstances.”); *see* supra at 3-4.

Relevance. As detailed in Exhibit A, each of the Documents contain information directly relevant to Plaintiffs' claims or defenses. For example, many of the documents relate to Flo's status as a health care provider or the nature of the information Flo shared. Other documents relate to issues such as inquiry notice or whether Flo's conduct complied with its privacy policies.

Not Inadmissible Hearsay. The relevant content in most of the Documents are factual statements by Flo, and therefore, statements of a party opponent. *See* FRE 801(d)(2). Several of the Documents relevant to inquiry notice are non-hearsay because they are not submitted for the truth of the matter but to establish the effect of Flo’s public statements. *See* FRE 801(c).

1 **III. CONCLUSION**

2 For the reasons stated herein, the Court should preliminarily rule that each of the
 3 Documents listed in Exhibit A may be introduced at trial as authentic and admissible, for the
 4 purposes described therein. This ruling would streamline trial substantially. The Court would not
 5 be prevented from revisiting this determination if a need to do so arises during trial.

6

7 Dated: July 11, 2025

/s/ Jake Bissell-Linsk

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